

NTSB Order No.  
EM-120

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 17th day of May, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard

v.

PETER A. MADJIWITA, Appellant

Docket ME-109

OPINION AND ORDER

ERRATA

Please make the following pen and ink changes to the subject opinion and order.

Page 1, line 4 should read

"the Tower Drive Bridge."<sup>9</sup> Indeed, we think it axiomatic

---

<sup>9</sup>Appellant's contention that he is blameless because the Coast Guard's own evidence proves mathematically that the allusion could not have occurred is without merit. While it is true that the Coast Guard's evidence suggests that the vessel should have cleared the bridge by an inch or so, it incorporates the chief mat's estimate, not known to appellant, that the vessel height just before this incident was 116 8" or 9", and the conjecture that the water level in the Fox River was the same as in the area of Lake Michigan for which the Corps of Engineers had figures on other dates, that is, a level of plus 38 inches. Bridge clearance (120 ft.) minus water level (38 in.) minus vessel height (116 ft. 8 or 9 inches) equals one or two inches for vessel clearance. Since we do not know whether these were the actual water level and the actual vessel height, the Coast Guard's evidence support no conclusion respecting the published clearance for the bridge. We note, in this connection, that consistent with appellant's speculation at the hearing that someone may have used the boom and not returned it to its prior position, it is suggested on brief, that "the information given to appellant regarding use and adjustment of the booms after passing through the Well and Canal was wrong." We find no support in the record for this suggestion. On the contrary, it would appear that appellant neither solicited nor received any information concerning the booms after he assumed navigational responsibilities.

that"

Page 7, paragraph 2, line 6 should read "essentially was an  
issue of law. In other words, we"

General Counsel

July 18, 1985

NTSB Order No.  
EM-120

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON , D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 17th day of May, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard

v.

PETER A. MADJIWITA, Appellant

Docket ME-109

OPINION AND ORDER

The appellant, by counsel, challenges an August 14, 1984 decision of the Vice Commandant (Appeal No. 2368) affirming a suspension (two months outright and three months on twelve months' probation) of his merchant mariner's license (No. 514802) as ordered by Administrative Law Judge Rosemary A. Denson on March 16, 1984 following an evidentiary hearing completed on August 25, 1983.<sup>1</sup> The law judge had sustained a charge of negligence on finding priced a specification alleging that appellant, while serving as pilot aboard the M/V PASSAT on August 17, 1983, negligently had failed to insure that there was adequate vertical clearance for the vessel to pass beneath the Tower Drive Bridge over the Fox River at Green Bay, Wisconsin. As a result of that failure, the specification asserts, one of the vessel's cargo hatch booms struck the bridge.<sup>2</sup> On appeal to the Board, appellant contends that the Vice Commandant's decision contains factual and legal errors that require reversal of the suspension order. As we find, for the reasons discussed below, no merit in appellant's contentions, his appeal will be denied.

The facts of this incident are set forth at length in the law judge's and the Vice Commandant's decisions and will not be repeated extensively here. Appellant began directing the navigation of the last leg of the vessel's Rotterdam, The Netherlands, to Green Bay, Wisconsin, voyage about two days before

---

<sup>1</sup>Copies of the decisions of the vice Commandant (acting by delegation) and the law judge are attached.

<sup>2</sup>The record does not reflect whether the bridge sustained any damage. However, the ship's #4 cargo hatch boom apparently was destroyed.

the incident, when he boarded at Port Huron, Michigan.<sup>3</sup> He appears to have assumed that there would be adequate clearance for passage under the Tower Drive Bridge because the vessel had transmitted successfully, a day or so before he joined the vessel, under at least one bridge in the Well and Canal which he believed to be lower; specifically, 117 ft. at low water datum.<sup>4</sup> He reasoned therefore that the highest point on the vessel could be no more than 117 ft. and that if he added a safety factor for high water of two and one half feet to that height the vessel still would be able to pass beneath the Tower Drive Bridge which he believed had a 120 ft. clearance at low water datum. The evidence suggests strongly, however, that the water level in the Fox River on the date in issue was more than 3 ft. above low water datum.<sup>5</sup> In any event, although the cargo hatch booms on the forward half of the vessel did clear the bottom of the bridge, the No. 4 boom, apparently only a few inches too high, hit the bridge, crumpled, and fell.

The law judge found that appellant had failed to rebut the presumption of negligence that arises when a moving vessel strikes a fixed object.<sup>6</sup> She found also that appellant was negligent because he made no effort to ascertain the height of the highest point on the vessel and the level of the water above low water datum. We find no error in the law judge's conclusions and no merit in appellant's challenges to them.

Many of appellant's contentions on this appeal appear to

---

<sup>3</sup>The M/V PASSAT is a 491 ft. Panamanian flag cargo vessel. It was proceeding to Green Bay to take on cargo.

<sup>4</sup>The Well and Canal is located in Canada near Niagara Falls, New York. It is crossed by 12 bridges and, according to the 1983 Coast Pilot, the lowest of these limits overhead clearance to 120 ft. and the maximum permissible mast height for vessels transuding the canal is 116-1/2 ft.

<sup>5</sup>The U.S. Army Corps of Engineers reported the water level in adjoining Lake Michigan to be plus 38 inches on August 5, 1983 and had projected it to be the same height on August 20. See I.O. Exh. 2. Gauges along the river permit ship traffic to ascertain the actual water level as it fluctuates.

<sup>6</sup>The Board has on numerous occasions upheld such an application of this admiralty law presumption. See, e.g., Commandant v. Pierce, NTSB Order EM-81 (1981) and Commandant v. Tingley, NTSB Order EM-86 (1981), aff'd 688 F.2d 848 (9th Cir. 1982). These cases also establish that proof of such an allusion is prima facie evidence of negligence. It follows that the law judge did not, as appellant maintains, err by denying his motion to dismiss at the conclusion of the Coast Guard's case.

reflect a belief that the Coast Guard was obligated to prove why the vessel hit the Tower Drive Bridge or, at least, to prove that the bridge's clearance height was in fact 120 ft. We perceive no basis for concluding that the Coast Guard had such an obligation.<sup>7</sup> Rather, the Coast Guard essentially met its burden of proof by establishing the facts of the allusion and appellant's responsibility for the vessel's navigation. It was thereafter incumbent on the appellant to overcome the presumption that his management of the vessel's navigation had been deficient. We concur in the Vice Commandant's view that he failed to do so.

Appellant argues that it was reasonable for him to assume that the vessel would clear the Tower Drive Bridge because it had cleared what he believed to be a lower bridge on the Welland Canal. This assumption was not, in our judgement, reasonable. Apart from the fact that appellant's assumption appears to have been based in part on a misconception as to the clearance of the lowest bridge on the Welland Canal, *i.e.*, that it was 117 ft. rather than 120 ft., it presumes that the water level beneath the Tower Drive Bridge, several days later and several hundred miles away, would be roughly the same and that the vessel height would remain constant notwithstanding trim and draft changes due to fuel and water consumption. Since, however, both of these factors are subject to fluctuations that could be significant where the adequacy of clearance is at issue, appellant's reliance on the safe transit through the canal alone does not impress us as a prudent navigational judgement.<sup>8</sup> On the contrary, it appears that appellant navigated the vessel on the basis of unverified and questionable assumptions concerning water levels and vessel height he could have checked easily to avoid any risk of damage to the vessel or the bridge. In these circumstances, the presumption of negligence arising from the fact of the allusion with a fixed object was not rebutted.

We agree also with the Vice Commandant's conclusion that appellant acted negligently in failing to ascertain the actual water level in the Fox River and the precise height of the vessel

---

<sup>7</sup> Appellant was of course free to present evidence that the clearance was something less than 120 ft. and that he had relied on the published figure to his detriment. He advanced no such evidence.

<sup>8</sup> We also point out that the water level in the canal is controlled to some extent by locks. The record before us does not reveal the water level in the section of the canal over which the lowest bridge crosses. Appellant's testimony suggests he believed that the level was 2 ft. above low water datum. The basis for that belief is not evident from the record.

before proceeding under the Tower Drive Bridge.<sup>9</sup> Indeed, we think it axiomatic that a pilot must possess or obtain accurate and up-to-date information on all matters that may affect his ability to navigate a vessel safely through a waterway. Appellant did not undertake to inform himself on such matters in this instance, and the vessel sustained foreseeable damage that could have been averted had he done so. We believe that such conduct falls below minimum standards of care under both the traditional and the Coast Guard definitions of negligence.<sup>10</sup>

Appellant's view that the Coast Guard did not establish an act of negligence under its regulations because it did not produce other pilots to testify as to how they would have acted in the instant situation is mistaken. While such testimony might be desirable, even necessary, in other contexts, we think the question of negligence in this proceeding essentially was an issue of law. In other words, we do not think the Coast Guard's case was flawed because it did not produce testimonial proof that navigating a

---

<sup>9</sup>Appellant's contention that he is blameless because the Coast Guard's own evidence proves mathematically that the allusion could not have occurred is without merit. While it is true that the Coast Guard's evidence suggests that the vessel should have cleared the bridge by an inch or so, it incorporates the chief mate's estimate, not known to appellant, that the vessel height just before this incident was 116' 8" or 9", and the conjecture that the water level in the Fox River was the same as in the area of Lake Michigan for which the Corps of Engineers had figures on other dates, that is, a level of plus 38 inches. Bridge clearance (120 ft.) minus water level (38 in.) minus vessel height (116 ft. 8 or 9 inches) equals one or two inches for vessel clearance. Since we do not know whether these were the actual water level and the actual vessel height, the Coast Guard's evidence supports no conclusion respecting the published clearance for the bridge. We note, in this connection, that consistent with appellant's speculation at the hearing that someone may have used the boom and not returned it to its prior position, it is suggested on brief that "the information given to appellant regarding use and adjustment of the booms after passing through the Welland Canal was wrong." We find no support in the record for this suggestion. On the contrary, it would appear that appellant neither solicited nor received any information concerning the booms after he assumed navigational responsibilities.

<sup>10</sup> 46 CFR 5.05-20(2) defines negligence as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable prudent person of the same station, under the same circumstances, would not fail to perform." We do not see any significant difference between this definition and the "reasonable man" standard imposed at common law.

vessel under a bridge without foreknowledge that it would transit safely is imprudent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and
2. The decision of the Vice Commandant affirming the suspension ordered by the law judge is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman and BURSLEY, Member of the Board, concurred in the above opinion and order.